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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~376.~~ 145

THE NEW ORLEANS INSURANCE ASSOCIATION, PLAINTIFFS IN ERROR,

vs.

RINALDO PIAGGIO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED NOVEMBER 11, 1871.

Dec 2, 1871

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1 Circuit court of the United States, fifth circuit and district of Louisiana.

RINALDO PIAGGIO
vs.
THE NEW ORLEANS INSURANCE ASSOCIATION. } No. 6292.

Petition—Filed December 14th, 1870.

To the honorable the judges of the circuit court of the United States for the fifth judicial circuit and district of Louisiana:

The petition of Rinaldo Piaggio, a subject of the King of Italy, at present residing in the city of New Orleans, State of Louisiana, United States of America, humbly sheweth:

That the New Orleans Insurance Association, a corporation under the laws of the State of Louisiana, domiciled and doing business in the city of New Orleans, in the said State, and United States of America, is justly indebted unto petitioner in the sum of seven thousand dollars, insured upon the brig Sicilia; in the further sum of five thousand
2 seven hundred dollars insured on the freight-list of the said brig, payable in gold coin; and in the further sum of fifteen thousand dollars damages caused petitioner by the said New Orleans Insurance Association, with lawful interest on the said sums respectively, for this, to wit:

That, July 11th, 1870, petitioner effected a contract of insurance with the New Orleans Insurance Association upon the Italian brig Sicilia, belonging to him, then lying in the port of New Orleans for the period of one year, whereby the said association insured the said vessel against the perils of the seas and other risks of her intended voyages, all of which will fully appear from the policy of insurance issued to petitioner by the New Orleans Insurance Association, which policy is marked A and made part of this petition. And that having freighted the Sicilia with cotton for Helsingfors, in the Gulf of Finland, petitioner effected, July 15th, 1870, insurance upon her freight-list for five thousand seven hundred dollars gold, with the said New Orleans Insurance Association, payable to his own order on a certificate to that end, representing and taking the place of a policy, and issued in his favor by the said
3 association, all of which will fully appear from the certificate itself, which is marked B and made part of this petition.

That the Sicilia left the port of New Orleans for Helsingsfors, seaworthy, well appointed, and in good order and condition, properly officered and manned, laden with a valuable cargo of cotton, and sailed from the Southwest Pass of the Mississippi River, July 20th, 1870, but was compelled by the perils of the seas and unavoidable accidents to put into the port of Matanzas, Cuba, in distress and disabled, for the security of the property concerned and the preservation of the lives of those on board. That the Sicilia's main-mast was spring and general injury suffered by her, and that the greater part were disabled by sickness, which rendered the shipment of another crew indispensable.

That on the arrival of the Sicilia at Matanzas petitioner was telegraphed by her master that expensive repairs were required to enable her to proceed on her voyage, and enquiry by him made of petitioner whether the vessel should be abandoned to the insurers; and that petitioner showed the dispatch to this effect to Charles Cavaroc, the
4 president of the New Orleans Insurance Association; and being

advised by the latter to do so, tendered abandonment of the Sicilia to the said association and made claim for a total loss; and that the said insurance association at once accepted the abandonment, September 29th, 1870, and are bound to indemnify petitioner for the said brig Sicilia, and the said freight-list likewise by them insured.

That while the Sicilia, in order to repair, refit, and reman, was lying in the harbor of Matanzas with four anchors out, notwithstanding every exertion was made by her officers and crew to save her, and every due precaution had, she was driven ashore by a hurricane, and, together with her cargo, wrecked and entirely lost; and that by this wreck of the Sicilia, a loss to the extent of seven thousand dollars, the whole amount insured by the New Orleans Insurance Association on the said vessel has occurred, together with a loss to the extent of five thousand seven hundred dollars gold, the whole amount insured on her freight-list, after the date when the said contracts of insurance took effect, from one of the perils insured against; and that the said insurance association promised to pay petitioner the five thousand seven hundred dollars gold,
5 the whole amount insured on her freight-list, and actually informed petitioner that they would telegraph their bankers in London to pay the same to his order; but several days after such promise sent him word that they declined to do so, and now unlawfully and wrongfully refused to recognize any liability to him whatever in the premises; and that having instructed their said bankers by letter to pay the said sum they recalled the instructions to this effect and countermanded the same.

That when petitioner was informed by the New Orleans Insurance Association that the five thousand seven hundred dollars gold, due him on the freight-list of the Sicilia, would be paid, having previously transferred the original certificate therefor unto Pietro Campenello, of Genoa, Italy, his commercial correspondent of that place, petitioner drew against the same, and that his draft has been protested, his mercantile credit in Genoa, where he is in the constant habit of dealing, injured, and his transactions in business impeded and damaged to the extent of fifteen thousand dollars, which he is entitled to recover of the New Orleans Insurance Association.

Wherefore petitioner prays that the New Orleans Insurance
6 Association, a corporation established under the laws of Louisiana, and domiciled and doing business in the city of New Orleans, State of Louisiana, United States of America, be cited, through Charles Cavaroc, a citizen of Louisiana, and the United States, residing in New Orleans, State aforesaid, president of the said association, to appear and answer this petition, and, after due and legal proceedings, that petitioner do have and recover judgment against the said insurance association in the sum of seven thousand dollars, insured by them on the brig Sicilia; in the further sum of five thousand seven hundred dollars, gold coin of the United States, insured on the freight list of said vessel, and in the further sum of fifteen thousand dollars damages, with interest on said seven thousand dollars, and on said five thousand seven hundred dollars gold, from September 29th, 1870, the date of the abandonment made of the Sicilia, at the rate of five per centum until paid; and on said fifteen thousand dollars damages at the same rate, from date of judicial demand, and for costs; and such further relief as equity, law, and the nature of the case may require.

(Signed) CARLETON HUNT,
" RANDALL HUNT,
Att'ys for Pet'r.

7 *Policy of insurance marked "A."—Filed Dec. 14th, 1870.*

THE NEW ORLEANS INSURANCE ASSOCIATION,

By this policy of insurance, do make insurance and cause to be insured, R. Piaggio, on account of himself, lost or not lost, in the sum of seven thousand dollars at and from July eleventh, 1870, to noon of July 11th, 1871, upon the body, tackle, apparel, and other furniture of the good brig
Vessel No. 263. called the Sicilia, whereof is master of the present voyage or whoever else shall go for master in the said vessel, or by
Sum insured $10,000. whatever name or names the said vessel or the master thereof is or shall be named or called. Each passage subject to its
Valued at $7,000 including premium. own average. If on a passage, at the expiration of the term, with the liberty to renew for not exceeding three months, at the same rate of premium, if applied for on or before the end
Rate 5 per cent. of the term. The risk to cease twenty-four hours after her arrival at her then port of destination, and to return pro-rata
Premium $350 00. premium for each month not commenced, no loss being claimed.

Policy..... Beginning the adventure upon the said vessel, tackle, apparel, etc., at and from as aforesaid, and so shall continue
..... and endure until the said vessel be safely arrived at as afore-
8 said and until she be moored twenty-four hours in good safety. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch, or stay at any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said vessel, tackle, etc., hereby insured, are valued at ten thousand dollars, without any further account to be given by the assured to the assurers or any of them for the same. Touching the adventures and perils, which the insurers are contented to bear and take upon themselves in this voyage, they are of the seas, jettisons, fire, barratry (except embezzlement or theft) of the master, unless the insured be an owner of the vessel, and of mariners, and all other losses to which the insurers are liable by this contract. And in case of any loss or misfortune resulting from any peril insured against, the party insured engages for his or their factors, servants, and assigns, to sue, labor, and travel for, and use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured or any part thereof; to the charges whereof, the said association engages to contribute in proportion as the sum insured bears to the whole sum at risk. And the acts of the insured or insurers or their agents,
9 in preserving, securing, or saving the property insured in case of danger or disaster shall not be considered or held to be a waiver or acceptance of an abandonment. The association having been paid, or promised to be paid the consideration for the assurance by the assured, or his or their assigns, at and after the rate of five per cent.

It is also agreed that the insurers shall not be answerable for any expense, damages, or loss which may arise in consequence of seizure or detention for or on account of any trade charged with being illicit or prohibited, or any trade in articles contraband of war, whether carried on or by the master, mariners, or any other persons, barratrously or otherwise, unless the insured shall show that the trade charged so to be was illicit or prohibited. The insurers shall not be answerable for damages to any other vessels or property in consequence of collision or running foul, nor for any general average or expense on account of such damage. The insurers take no risk of embargo or blockade of a port of destination; the vessel may proceed to any other port not blockaded,

and wait for the blockade to be raised; and, in case of an embargo
10 or blockade of the port of departure, the vessel may wait there for the termination of the embargo or blockade. In each case the vessel shall continue at the risk of the insurers while so waiting, not exceeding the date to which the vessel is insured, provided the vessel is insured on time; but if for the passage or voyage, then, in case of any interruption of the voyage by blockade or embargo, it is further mutually agreed that the assured warrants the insurers free from all claims for loss or damage whilst so interrupted, or during the time the vessel may wait for the raising of the blockade or embargo. If at sea, the vessel may proceed to the nearest neutral port on the payment of additional premium corresponding to the usual rates between such ports, and the risk shall ceased ten days after her arrival there. The association shall not be liable for wages and provisions in case of capture, arrest, blockade, embargo, or restraint. And in case of a total loss, with salvage, the amount allowed out of the savings to the officers and crew, for wages earned and services rendered previous to the loss, shall be considered as so much of the salvage applied to the use of the owners, even though the same shall be allowed or paid under the
11 name of salvage, and not as wages, and shall accordingly be deducted in adjusting the loss.

And it is further agreed that, in case a total loss shall be claimed for or on account of any damage or charge to the said vessel, the only basis of ascertaining her value shall be her valuation in this policy.

It is also agreed that, in case of loss or damage, the repairing or replacing of loss or damage shall only be estimated or charged against the insurers, after excluding all losses or damages requiring to be repaired or replaced in consequence, in the whole or in part, of wear and tear, or natural decay. The proceeds of all articles replaced at the charge of the insurers shall be deducted from the net loss, after the usual allowance of new for old; and, instead of deducting one-third from the cost of copper, there shall be deducted two and one-half per cent. of the net cost of recoppering, after deducting the value of the old copper and nails for each and every month the copper shall have been on the vessel, when the copper shall be replaced, and, if the copper shall have been on forty months or more, the cost of recoppering shall be wholly excluded—the new copper to be of the same weight as the old.

And it is also agreed that if the said vessel, upon a regular
12 survey, should be declared unseaworthy or incapable of prosecuting her voyage, and unsoundness and rottenness shall appear on the survey, or by any other testimony to be a principal cause thereof, then the assurers shall not be bound to pay for any loss on this policy. And in case of stranding, without the breaking up of the vessel, no abandonment shall be made until after thirty days from its occurrence and notice thereof to the insurers, nor unless the right to abandon shall then exist.

In case of general average, if the vessel insured is valued in the statement thereof beyond the amount hereby insured, the insurers are to pay such part only of the sum assured as the amount insured bears to such valuation. And in case of loss, such loss is to be paid in months after proof of loss and proof of interest in said vessel, the amount of the note given for the premium, if unpaid, and all sums owing to this association by the said assured being first deducted. [*No

* Erased.

loss except general average shall] in any case be paid unless amounting to seventy-five per cent., after deducting proceeds of savings, if any, and exclusive of all charges of ascertaining and proving the loss.

13 And it is hereby further agreed that if the insured shall have made any other insurance against all or any of the risks hereby insured upon the vessel aforesaid, prior to this policy, then the said insurance association shall be answerable only for so much as the amount of such prior insurance may be deficient towards covering the property at risk. And the said insurance association shall return the premium upon so much of the sum by them insured as they shall be exonerated from by such prior insurance. And in case of any insurance upon said vessel subsequent to this policy, the said insurance association shall nevertheless be answerable to the full extent of the sum by them insured without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent insurance had been made. Policies made the same day are to be deemed simultaneous, but this association then assumes only its proportion of the loss to be made good by the insurers, as the sum insured in this policy bears to the aggregate sum at risk. If the voyage aforesaid shall have been begun,

14 and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage. In all cases of return premium one-tenth part of the premium thereon is to be retained by the insurers. It is also agreed that this policy shall be void in case of its being assigned, transferred, or pledge', without the previous consent in writing of the insurers.

Warranted by the assured not to carry lime, and not to carry at any one time more than one-half of her registered tonnage of grain in sack or bulk.

Also, warranted against any desertion, temporary or otherwise, of the vessel, by master, officers, or mariners, on the western coast of America, or in any of its bays, ports, or places, and against losses proceeding directly or indirectly from such desertion.

Warranted by the assured not to use port or ports in Eastern Mexico, Texas, nor Yucatan, nor anchorage thereof, during the continuance of this insurance; nor ports in the West India Islands between July 15th and October 15th; nor ports on the northeast coast of Great Britain beyond the Thames; nor ports on the continent of Europe north of Antwerp, between November 1st and March 1st.

15 Warranted not to load with coal, lead, marble, iron, or guano, exceeding register tonnage.

Warranted by the assured free from constructive total loss, unless the sum for which the insurers would be liable under an adjustment for a particular average made in conformity with the terms of this insurance shall exceed fifty per cent. of the whole value of the vessel, as agreed upon in this policy.

Warranted by the assured free from all claim for loss or damage arising from, or growing out of, the collision of foreign or other powers, or of our own Government with others.

It is mutually agreed that, in case of any claim for loss under this insurance, the same shall be due and payable in two months after proof and adjustment of the same in currency existing at the time said loss shall become due.

General privilege not beyond the Cape of Good Hope & Cape Horn, during one year.

No particular average payable under seventy-five per cent. considered total loss.

16 [SEAL.] In witness whereof The New Orleans Insurance Association have caused these presents to be signed by their president, and attested by their secretary at their office in the city of New Orleans.

New Orleans, this 11th day of July, 1870.

(Signed) C. CAVAROC, *President.*

(") G. LANAUX, *Secretary.*

[Fifty cents int. revenue, affixed & cancelled.]

Endorsed:) New Orleans Insurance Association. Marine hull. No. 263. R. Piaggio, on hull, &c., of brig Sicilia. $7,000 at 5 per cent., $350.00; policy, $.—$. Expires July 11th, 1871.

Certificate of insurance marked "B."—Filed December 14th, 1870.

17 Certificate of insurance. (Duplicate.)

$5,700.] [No. 143.

Marks & Numbers.

OFFICE OF THE NEW ORLEANS INSURANCE ASSOCIATION,
New Orleans, July 19th, 1870.

We hereby certify that, on the 15th day of July, 1870, this association insured under policy No. 120, made for R. Piaggio, and dated Oct. 23d, 1869, five thousand seven hundred dollars gold *dollars* on freight-list per brig Sicilia, at and from New Orleans to Helsingfors, loss, if any, payable to the order of R. Piaggio endorsed on this certificate, which is to be surrendered to this association. It is understood & agreed that this certificate represents and takes the place of the policy, and conveys all the rights of the original policy holder, for the purpose of collecting any loss or claim, as fully as if the property was covered by a special policy direct to the holder of this certificate, and free from any liability for unpaid premiums. Each 10 bales of cotton, in

18 the order of landing, subject to 3 per cent. average.

It is agreed that claims under this certificate shall be reported to the company's agent in London, as soon as the goods are landed, or the loss known to be adjusted according to usages there, but subject to the conditions of the policy and the contract of insurance. Payable in sterling at 110 per cent. Exchange at the counting-house of Messrs. Kraeutler & Mieville, London agents.

Loss payble in .

[SEAL.] (Signed) F. E. BERNARD, *President, P. T.*

(") G. LANAUX, *Secretary.*

(Endorsed:)

Pay to the order of Pietro Campanella of Genoa, Italy.

New Orleans, 21 July, 1870.

(Signed) R. PIAGGIO.

Citation to The New Orleans Insurance Association.

RINALDO PIAGGIO
vs.
HE N. ORL'S INS'CE ASSOCIATION. } No. 6292.

he President of the United States of America to the marshal of the district of Louisiana, greeting:

You are hereby commanded to summon the New Orleans Insurance ssociation, through Charles Cavaroc, president thereof, & a citizen of e State of Louisiana, to comply with the demand of Rinaldo Piaggio, subject of the King of Italy, contained in the petition of which a copy accompanies this citation, or to deliver their answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, ten days after service hereof, or judgment will be rendered against em by default, which delay is increased one day for every ten miles e defendant's residence is distant from New Orleans, the place where e court is held, and that you make due return hereof on the first Mony of January, 1871.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme urt of the United States of America, at the city of New Orleans, is 14th day of December, A. D. one thousand eight hundred and seventy d of the independence of the United States of America the 95th year.

(Signed) D. URBAN, *Clerk.*
" By F. B. VINOT, *D'y Clerk.*

Marshal's return.

Received Dec. 15th, 1870, by the United States marshal, and on the ne day, month, and year, served a copy of the within citation and companying petition on the within-named the New Orleans Insurance sociation through its president, Charles Cavaroc, by delivering the ne to him in person at his office on Exchange alley, near Canal street, in this city.

New Orleans, December 15th, 1870.

(Signed) F. A. WOOLFLEY,
D'y U. S. Marshal.

Supplemental petition.—Filed January 7th, 1871.

RINALDO PIAGGIO
vs.
E N. O. INS. ASSOCIATION. } No. 6292.

the honorable the judges of the circuit court of the United States for the fifth judicial circuit and district of Louisiana:

The supplemental petition of Rinaldo Piaggio, a subject of the King Italy, now residing in the city of New Orleans, State of Louisiana, d United States of America, with respect, sheweth:

That the defendant in this suit, the New Orleans Insurance Associan, a corporation under the laws of Louisiana, domiciled and doing siness in the city of New Orleans, in the said State, and United States America, re-insured for ten thousand dollars the cargo laden on the lian brig Sicilia, under a certain open marine policy No. 181, for the isiana Mutual Insurance Company, also a corporation under the

laws of Louisiana, and domiciled in New Orleans, for the same
21 voyage of the Sicilia already set forth in the original petition herein filed, and pursuant whereto that vessel sailed from the Southwest Pass of the Mississippi River July 20th, 1870, and that the New Orleans Insurance Association, on or about November 14th, 1870, actually settled and satisfied their entire liability for thus re-insuring the cargo of the Sicilia, and paid the Louisiana Mutual Insurance Company the said sum of ten thousand dollars.

That petitioner tendered the New Orleans Insurance Association, on or about October 4th, 1870, abandonment of freight list of the Sicilia, insured as already by him set forth, for five thousand seven hundred dollars gold, in that association, and claimed therefrom a total loss; and that he is entitled to amend the original petition filed in this case by making the foregoing part of the same.

Wherefore petitioner prays for leave to file this his supplemental petition, and to amend that by him first filed accordingly and that service thereof be duly made on the New Orleans Insurance Association, through their president, Charles Cavaroc, a citizen of Louisiana, and of the United States of America, residing in New Orleans; and
22 petitioner further prays the court for such general relief as equity, law, and the nature of the case may require.

(Signed) CARLETON HUNT,
" RANDELL HUNT,
For Petitioner.

Order.

Let this supplemental petition be filed.
January 7th, 1871.
(Signed) E. H. DURELL, *Judge.*

Marshal's return.

Received January 7th, 1871, by the U. S. marshal, and on the same day, month, and year served a copy of the within supplemental petition on the within-mentioned New Orleans Insurance Association, through Charles Cavaroc, president thereof, by delivering the same to him in person at No. 6 Exchange alley, in this city.

New Orleans, January 7th, 1871.
(Signed) GUS. HOLLANDER,
D'y U. S. Marshal.

Supplemental petition.—Filed January 12th, 1871.

RINALDO PIAGGIO *vs.* N. O. INS. ASSOCIATION. } No. 6292.

24 To the honorable the judges of the circuit court of the United States for the fifth judicial circuit and district of Louisiana:

The supplemental petition of Rinaldo Piaggio, a subject of the King of Italy, at present residing in the city of New Orleans, State of Louisiana, United States of America, humbly sheweth:

That the freight-list of the Italian brig Sicilia was insured in the New Orleans Insurance Association, defendant herein, a corporation under the laws of Louisiana, domiciled in New Orleans, Louisiana,

United States of America, under a certain open policy No. 120, expressly mentioned in the certificate B already filed, against peril of the sea and other risks in said open policy set forth: and that petitioner annexed said policy, marked C, and desires to make it part of the first petition filed by him in this suit.

Wherefore he prays for leave to file this supplemental petition, and that his said original petition be amended by making the open policy so referred to part thereof, and that policy filed accordingly; and that the said defendants be duly served and cited to answer this petition through Charles Cavaroc, their president, a citizen of Louisiana, residing in New Orleans, and for all general & equitable relief.

24 (Signed) RANDELL HUNT,
" CARLETON HUNT,
For Petitioner.

Order.

Let this supplemental petition be filed.
January 12th, 1871.
(Signed) E. H. DURELL, *Judge.*

Documents marked "C."—Filed January 12th, 1871.

APPLICATION FOR INSURANCE.

Marine application under open policy No. 120.

To the New Orleans Insurance Association:

Insurance is wanted by R. Piaggio, for account of himself, loss, if any, payable to him on merchandise valued at as interest may appear.

This insurance is declared to be on any and all shipments made to the ad'ress of the assured, belonging to him & to such other shipments, when insurance is ordered by endorsement on bill of lading at time of shipment, to be insured under this open policy, on board any good and seaworthy steamship or sail vessel, between the 23d day of October,
25 1869, and the 23d day of October, 1870, at and from any seaport in the United States, and foreign ports from and to New Orleans.

Warranted that no risk by any one vessel, at any one time, shall exceed fifteen thousand dollars under this insurance. Warranted by the assured that declarations shall be made to the association of each and every shipment as soon as notice is received, by receipt of bill of lading or otherwise; and any neglect or refusal so to do shall cancel this insurance.

Subject to the current rates of premium, and to all the clauses and conditions contained in the policies of this association.

All premiums received and losses paid in national currency.

This application being referred to by entry in the book attached to the above-described open policy and a copy hereof attached hereto, it is understood and agreed shall be as binding as if fully inserted in the body of said policy.

(Signed) R. PIAGGIO,
Applicant.

Approved.

CHA'S CAVAROC,
President.

NEW ORLEANS, *October 23d*, 1869.

New Orleans Insurance Association. Duplicate.

Policy of insurance.

26 New Orleans Insurance Association by this policy of insurance do make insurance and caused to be insured R. Piaggio, for account of whom it may concerned, lost or not lost, at and from ports or port, to New Orleans and vice versa, upon all kinds of lawful goods and merchandise laden or to be laden on board of the good steam or sail vessels whereof is master for the present voyage, or whosoever else shall shall go for master in said vessel, or by whatever name or names the said vessel or the master thereof is or shall be named or called.

Cargo per vessel.

No. 190.

Sum insured, $,

Valued at $ including premium.

Beginning the adventure upon the said goods and merchandise from, and immediately following, the loading thereof on board of the said vessel, at aforesaid and so shall continue and endure until the said goods and merchandise shall be safely landed at aforesaid, or any part thereof. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch, and stay at any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said goods and merchandise hereby insured are valued at .

Rate, per cent.

Premium, $.

Policy, $.

$.

27 Touching the adventures and perils which the said New Orleans Insurance Association is contended to bear and take upon itself in this voyage, they are of the seas, fires, jettisons, pirates overpowering, but not other theives, barratry (except embezzlement or theft) of the master, unless the insured be an owner of the vessel, and of mariners. And in case of loss or misfortune arising from any peril insured against, the party insured engages for his, her, or their factors, servants, and assigns, to sue, labor, travel for, and use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured or any part thereof, to the charges whereof the said association engages to contribute in proportion as the sum insured bears to the whole sum at risk; and the acts of the assured and assurers or of their agents in preserving, securing, or saving the property insured, in case of danger of disaster, shall not be considered or held to be a waiver or acceptance of an abandonment; the association having been paid or promised to be paid the consideration for this insurance by the assured, or his, her, or their assigns, at and after the rate of .

It is also agreed that the insurers shall not be answerable for any expense, damage, or loss which may arise in consequence of seizure

28 or detention for or on account of any trade charged with being illicit or prohibited, or any trade in articles contraband of war, whether carried on by the master, mariners, or any other person, barratrously, or otherwise, unless the insured shall show that the trade charged so to be was not illicit or prohibited. The insurers shall not be answerable for damage to other vessels or property in consequence of collision or running foul, nor for any general average or expenses on account of such damage. The insurers to take no risk of embargo or blockade, but in case of a blockade of a port of destination the vessel may proceed to any port not blockaded, the assured paying additional premium therefor, corresponding to the existing tariff rates at that time between the original port of destination and the port used, and there end the voyage. And in case of an embargo or blockade of a port of departure, the vessel may wait there for the termination of the

embargo or blockade the assured warranting the assurers free from all claim for loss or damage whilst so detained, and also free from particular average for the voyage. The association shall not be made liable for wages or provisions in case of capture, arrest, blockade, em-
29 bargo or restraint. And it is hereby agreed that, in case of general average, the insurers shall only be liable under this insurance for the propertion of average due on the sum insured; and, if the cargo insured is valued in the statement of average beyond the amount hereby insured, the insurers are to pay such parts only of the sum assessed as the amount insured bears to such valuation, and the assured shall not have the right to abandon for loss through jettison or forced sales at port of necessity. Goods on deck shall not be made good by general average contribution except by a charge on the deck-load.

MEMORANDA.—It is also agreed that bar, bundle, rod, hoop, or sheet iron, wire of all kinds, tin plates, steel, hardware not in casks or cases, and machinery shall be warranted by the assured free from any average, arrising from wet or rust. Salt in bulk, grain of any kind, peas, beans, madder, sumac, wicker-ware, willow, (manufactured or otherwise,) straw braid, cut straw, hempen yarn, bags, (except gunny-bags,) cotton bagging, and other articles used for bags or bagging, (except gunny-cloth,) cars, pleasure and travelling carriages, furniture, family clothing, pictures, painting, musical instruments, looking glasses,
30 looking-glass plates, cheese, jerked beef, fish, (except pickled fish in casks, hides, fur-skins, (except in casks,) and other skins and peltries, almonds, nuts, fruits, (whether dried, preserved, or otherwise,) hops, vegetables, sarsaparilla or other roots, ice and all other articles perishable in their own nature, are warranted free from average, unless it happen by stranding or collision, and amount to twenty per cent. Indian meal, tobacco stems, rags, matting, cassia, (except cassia in boxes,) hemp, flax, salt in bags, palm leaf or manufactures of palm leaf, are warranted by the assured free from average under twenty per cent. Leaf tobacco, (except in bales,) rice, cocoa, sal'petre, gunny-bags and gunny-cloth, books, paper, and paper hangings, crockery, and glassware, cocoa, and coffee in bags or bulk, pepper in bags, pimento, sugar, flaxseed, and bread, are warranted by the assured free from average under ten per cent. And the insurers assumes the loss of articles not remaining in specie, but actually lost, if amounting to the above limitations, and not otherwise, and amounting to at least five per cent. on the whole sum at risk. Should the vessel on which the goods have been shipped not be heard of within twelve months from the time she leaves her
31 last port, then she shall be deemed lost, and this association will pay the loss without further delay. The insurers shall not be liable for damage or injury to goods by wet or dampness, change of flavor, or by being spotted, discolored, or mouldy, unless the same be caused by actual contact with sea-water with the articles damaged. In case of loss or injury to any part of a machine or vehicle, consisting, when complete for sale or use, of several parts, the insurers shall only be liable for the cost of the part lost or damaged, unless it shall amount to more than half the insured value of such machine or vehicle. In case of loss of the vessel, or a part of the cargo, or of damage to the whole or part thereof, it shall be the duty of the master to forward such parts of the cargo as shall be saved in a fit condition to be shipped, to its port of destination by the best conveyance obtainable at the place where the save' goods may be, or at any other place within a reasonable distance; and the enhenced expense thereof, not exceeding the amount insured, shall fall on the insurers in propertion as the insured value bears to the sound. It

is agree' that in case of damage to part of a cargo, no sound goods shall, on that account, be sold. This association not to be answerable
32 for loss or damage by wet or exposure to the elements, of goods insured as on deck. The association is not liable for breakerage, nor for leaking on molasses or other liquids, unless occasioned by stranding.

And it is hereby agreed that if the insured shall have made any other insurance against all or any of the risks hereby insured upon said premises prior in date to this policy, then the said insurance association shall be answerable only for so much as the amount of such prior insurance may be deficient from covering the amount at risk; and the said insurance association shall return the premium upon so much of the sum by them insured as they shall be exonerated from by such prior insurance. And, in case of any insurance upon said premises subsequent in date to this policy, the said insurance association shall, never'less, be answerable to the full extent of the sum by them herein insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent insurance had been made. And, in case of loss, such loss to be paid in sixty days after proof of inter-
33 est in the said property, and proof of loss and adjustment, the amount of the premium note and all other sums owing to this association by the said assured by note or otherwise, due or not due, being first deducted: provided, that no loss except general average shall in any case be paid, unless amounting to five per cent. after deducting proceeds of savings, if any, and exclusive, in each case, of all charges and expenses of ascertaining and proving loss. If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage. In all cases of return, premium for short interest, one-tenth part of the premium thereon, shall be retained by the assurers.

Manufactured tobacco warranted by the assured free from partial loss.

Warranted by the assured free from all claim for loss or damage arising from, or growing out of, the collision of foreign powers, or of our own Government with others.

This insurance to be on merchandise.

No risk from New Orleans binding until approved and entered in the annexed book by assurers.

34 To the extent of, as interest may appear, dollars.

In witness whereof the New Orleans Insurance Association have caused these presents to be signed by their president, and attested by their secretary, at their office in the city of New Orleans.

New Orleans, this twenty-third day of Oct., 1869.

(Signed) C. CAVAROC, *President.*
(") G. LANAUX, *Secretary.*

Answer.—Filed January 13th, 1871.

United States circuit court.

R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

The defendants deny all the allegations in the plaintiff's petition, and specially aver:

That the policies of insurance on the hull of the brig Sicilia and on freight are null and void, because plaintiff never paid any premium therefor, altho' requested to pay the same; and because, at the time of its execution, the said brig was unseaworthy; and, for the further reason, that said brig was not well officered and manned, and not provisioned sufficiently for a voyage from port of New Orleans to that
35 of Elsingfors; that the cargo was not properly stored; and that, in every respect, the said brig was wholly unfit to navigate from the port of New Orleans to that of Elsingfors; that, by reason of her unseaworthiness and not through any perils of the seas, she put up in the port of Matanzas, and then and there the plaintiff's agents having ascertained that they could not raised money on a bottomry bond to refit her and make her seaworthy, telegraphed to plaintiff in New Orleans, inquiring whether an abandonment should be made to the insurers, and representing that she had been dissabled by the perils insured against; that, upon said informal notice, and trusting to the good faith of the insured, the defendants, on his representation, but with full reservation of investigation, agreed to accept in the meantime the abandonment, and for the purpose of accommodating the pl'ff agreed at once to advance funds in Europe in anticipation of preliminary proofs, and before the lapse of delays for payment under the policy; that, in the meantime, the defendants having become apprised of the true state of facts relative to said abandonment, and of the frauds practised on them, re-
36 voked the acceptance of the same, and declined perfecting arrangements for said accommodation advances; that the policies of insurance on said brig and freight are also vitiated by reason of the deviation in voluntarily putting in the port of Matanzas.

Respectively pray to be dismissed with costs.

(Signed) E. BERMUDEZ,
(") ABERT VOORHIES,
Att'ys for Defendants.

Supplemental petition.—Filed January 27th, 1871.

United States circuit court.

RINALDO PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

To the hon. the judges of the circuit court of the United States for the fifth judicial circuit and district of Louisiana:

The supplemental petition of Rinaldo Piaggio, a subject of the King of Italy, at present residing in the city of New Orleans, State of Louisiana, United States of America, humbly sheweth:

That since he filed his original and other supplemental petitions herein, petitioner has ascertained that the defendants in this case,
37 The New Orleans Insurance Association, a corporation under the laws of Louisiana, domiciled in the city of New Orleans, in said State, and United States, did advertise publicly for three days for sale the wreck of the Italian brig Sicilia when the latter was lying, as heretofore set forth, in the harbor of Matanzas, Cuba; that the said defendants employed one G. Schneider, a marine surveyor, residing in New Orleans, to proceed to Matanzas, as their agents, and take possession of the Sicilia, after her abandonment had been accepted, as hereinbefore set forth; and that the said Schneider, in that capacity, actually took such possession, and sold the Sicilia accordingly, and the said defend-

ants received the proceeds of such sale; and that, pursuant to defendant's instructions, their said agent brought the damaged cotton cargo of the Sicilia to New Orleans on the steamer Lord Lovell, and that cargo was sold in this city for the benefit of defendants and the other insurers concerned, and by their order; and that petitioner desires to add the foregoing to the original petition hereintofore by him filed.

Wherefore he prays for leave to file this his supplemental petition, and to amend his said original petition by adding thereunto the foregoing:

38 That the defendants, the New Orleans Insurance Association, a corporation under the laws of Louisiana, domiciled in New Orleans in said State, and United States of America, be duly cited in the premises, through their president, Charles Cavaroc, a citizen of Louisiana, and of the United States, residing in New Orleans; and for such further relief as equity, law, and the nature of the case may require.

And petitioner will ever pray.

(Signed) CARLETON HUNT,
(") RANDELL HUNT,
For Petitioner.

Order.

Let this supplemental petition be filed.
January 27th, 1871.
(Signed) E. H. DURELL, *Judge.*

27th Jan'y, 1871. Service accepted.
(Signed) A. VOORHIES,
" E. BERMUDEZ,
For Defendants.

Answer.—Filed January 27th, 1871.

United States circuit court.

R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

39 For answer to the plaintiff's supplemental petitions, respondent' deny all the allegations therein contained, and specially aver:

That at the time that G. Schneider was sent as agent to transact the business concerning the hull and cargo of the brig Sicilia, stated then to be in distress at port of Matanzas, no information whatever had been received of the hurricane which took place whilst the vessel was in port aforesaid; that the said agent was sent to act for whom it might concern, with the full participation of plaintiff; that the instructions given to said agent distinctly reserved the matter of abandonment, that the previous information sent of the nature and extent of the damages alleged, were false and fraudulent; that the defendants were thereby induced in error, as alleged in the original answer; that, had the facts been truthfully conveyed, defendants would have declined taking any step in the premises to ascertained the amount of the alleged damaged.

Wherefore respondent, reiterating the allegations in the answer to the original petition, pray to be dismissed with costs.

(Signed) ALBERT VOORHIES,
(") E. BERMUDEZ,
Att'ys.

40 *Hearing & continuance.—Extract from the minutes.*

United States circuit court, fifth circuit and district of Louisiana, April term, 1871.

NEW ORLEANS, *Saturday, May 13th*, 1871.

Court met pursuant to adjournment.
Present, Hon. E. H. Durell, district judge.

R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

This cause was called for trial—R. & C. Hunt for plaintiff; A. Voorhies for defendant—when the following jurors were called and sworn to try the same:

1. J. H. GARDNER.
2. GEO. LARUE.
3. E. H. HARRIS.
4. F. WILLIAMS.
5. B. BRISCOE.
6. HENRY UTHOFF.
7. SUMPTER TURNER.
8. F. GRIMA, Jr.
9. AD. DUVALL.
10. B. F. SIMS.
11. ARISTIDE CAVELIER.

And being unable to complete the panel, by consent of counsel the cause is continued till Thursday, 18th inst, at 11 a. m.

*R. PIAGGIO
vs.
NEW ORLEANS INSURANCE ASSOCIATION. } No. 6292.

Hearing & continuance.—Extract from the minutes of May 20th, 1871.

*Reference approved.
F. A. WOOLFLEY, *Clerk.*

This cause came up agre'ably to continuance—R. & C. Hunt for plaintiff; A. Voorhies for defendants—and the 11 jurors empanelled on the 13th inst. having made appearance, Jno. C. Pooley was sworn and added to the jury. And the panel now being complete the trial proceeded, & after hearing the pleadings & evidence the cause is continued till Monday, 22 inst., at 11 a. m.*

Hearing & continuance.—Extract from the minutes of Monday, May 22d, 1871.

41 R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

This cause was resumed, and, after hearing argument, continued till to-morrow, 23d inst., at 11 a. m.

Note of evidence.—Filed May 22d, 1871.

R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

Plaintiff offered policy "A," doc'ts B & B^{b}, open policy No. 120, application C, and freight-list D.

Also, testimony E, F, G, H, I, K; documents 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20.
Charles Briggs and Capt. Schneider sworn for pl'ff.
Defendant offered doc't No. 21.
James Andy, stevedore; Tho's Conway, R. Piaggio, sworn for pl'ff.
Defendant offered protest, original and translation, marked No. 22.
Also, doc'ts No'. 23 & 24.
Charles Cavaroc, Geo. Lanaux, sworn for def't.

42 *Verdict.—Extract from the minutes of Tuesday, May 23d,* 1871.

R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

This cause was resumed, and, after hearing further argument and receiving a charge from the court, Mr. Frank Williams was appointed foreman of the jury, and they retired to consider on their verdict.
After due deliberation they returned into court, and delivered the following verdict, to wit:
The verdict of the jury in this case is as follows, viz:
"That the plaintiff shall recover from defendants the sum of seven thousand dollars, under his policy of insurance in the hull of the vessel; the sum of five thousand seven hundred dollars, gold coin, under his policy of insurance in the freight-list; together with interest on these two amounts, as prayed for in his petition; and the further sum of five thousand dollars damages, with interest at the rate of five per cent. from the date of judicial demand."
(Signed) FRANK WILLIAMS, *Foreman.*

Whereupon it is ordered that the verdict be recorded.

43 *Bill of exceptions No.* 1.—*Filed May 23d,* 1871.

United States circuit court.

R. PIAGGIO
vs.
NEW ORLEANS INS. ASSOCIATION. } No. 6292.

Be it remembered that, on the trial of this case, the defendants, throught their counsel, asked his honor, the judge presiding, to charge the jury as follows, to wit:
"That, if the jury find that the plaintiff abandoned the voyage when he had no right to make the abandonment of the Sicilia, by reason of repairs needed, falling short of the 75 % of valuation of said Sicilia, under the warrantee of the policy on the hull, then the plaintiff cannot recover on the policy for the freight, and his abandonment of the freight-list to the insurers did not bind the latter."
The court refused to give said charge. The defendants reserved their objections to the ruling, and tendered this their bill of exceptions, which was duly signed in open court this 23d day of May, 1871.
The court refused to give this charge because it was in proof
44 that an abandonment had been made and accepted without fraud, and under and in accordance with the advise of the defendant.
(Signed) E. H. DURELL, *Judge.*

I certify that copy of this bill of exceptions was served on C. Hunt, esq.

(Signed) A. VOORHIES, *Att'y.*

Bill of exceptions No. 2.—Filed May 23d, 1871.

United States circuit court.

R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

Be it remembered that, on trial of this cause, the defendants, through their counsel, asked his honor, the judge presiding, to charge the jury as follows, to wit:

"That an abandonment made by plaintiff through error, and accepted through error by the defendant, whether conditionally or unconditionally, is null and void, if not warranted at the time under the policy of insurance."

The court refused to give the charge. The defendants reserved their objections to said ruling, and tendered this their bill of exceptions, which was duly signed in open court this 23d day of May, 1871.

45 This was refused as irrevelent—no evidence having been adduced of error by either party. The court therefore considered it to be merely a speculative instruction or charge.

(Signed) E. H. DURELL, *Judge.*

I certifiy that a copy of this bill of exceptions was served on C. Hunt, esq.

(Signed) A. VOORHIES, *Att'y.*

Bill of exceptions No. 3.—Filed May 23d, 1871.

United States circuit court.

R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

Be it remembered that, on the trial of this cause, the defendants, through their counsel, asked his honor, the judge presiding, to charge the jury as follows, to wit:

"As the policy of insurance warrants that the insurers would be liable only for total loss, or constructive total loss, when the damage exceeded seventy-five per cent., if the jury find that the damage to the brig Sicilia, when in the port of Matanzas, did not exceed 75 % of the value put on her in the policy after deductions stated in said

46 policy, then the plaintiff had no right to make an abandonment."

The court refused to give said charge. The defendants reserved the point, and tendered this their bill of exceptions to the ruling of the court, which bill was duly signed in open court this 23d day of May, 1871.

The court refused to give the charge because it was in proof that an abandonment had been made and accepted without fraud, and under and in accordance with the advise of the defendant.

(Signed) E. H. DURELL, *Judge.*

I certify that a copy of this exception was served on C. Hunt, esq.
(Signed) A. VOORHIES, *Att'y.*

Bill of exceptions No. 4.—Filed May 23d, 1871.

United States circuit court.

R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

Be it remembered that, on the trial of this cause, the defendants, through their counsel, asked his honor, the judge presiding, to charge the jury as follows, to wit:

47 "That the reinsurance by defendants of the cargo of the Sicilia to the amount of $10,000, which had been insured by another company, not being made in favor of plaintiff, who was a total stranger to this transaction, has no connection with the issues raised as to the policy on the hull and freight of the Sicilia, and therefore can have no bearing on the decision of this jury; and that in the absence of proof as to the warranties in said insurance and reinsurance policies of $10,000 on the cargo, it is impossible to determine whether or not the payment and re-imbursement of said $10,000 were properly and correctly made; and that, whether properly or improperly paid, that circumstance cannot militate for or against either *of* the plaintiff or defendants in the present controversy."

The court refused to give said charge to the jury, and the defendants having reserved these objections to said ruling, tendered this their bill of exceptions, which was duly signed in open court this 23d day of May, 1871.

(Signed) E. H. DURELL, *Judge.*

I certify that a copy of this bill of exceptions was served on C. Hunt' esq.
(Signed) ALBERT VOORHIES, *Att'y.*

48 *Bill of exceptions No. 5.—Filed May 23d*, 1871.

United States circuit court.

R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

Be it remembered that, on trial of this cause, his honor, the presiding judge, on motion of pl'ff's counsel, charged the jury as follows, to wit:

"That independant of the abandonment, if the jury believe there was an actual total loss by storm and disaster of the sea, the plaintiff has a right to recover."

To which charge defendants' counsel objected; but said objection being overruled, the defendants reserved the point, and tendered this their bill of exceptions, which was duly signed in open court this 23d day of May, 1871.

(Signed) E. H. DURELL, *Judge.*

I certify that a copy of this bill of exceptions was served on the pl'ff's counsel, C. Hunt, esq.
(Signed) A. VOORHIES, *Att'y.*

Rule for a new trial.—Extract from the minutes of Thursday, May 25th, 1871.

49 RINALDO PIAGGIO *vs.* N. O. INS. ASSOCIATION. } No. 6292.

On motion of E. Bermudez & A. Voorhies, attorneys for defendants, ordered that plaintiff show cause on the 30th instant, at 11 a. m., why the verdict of the jury should not be set aside, & a new trial granted in this case on the grounds filed.

Grounds for new trial.—Filed May 25th, 1871.

United States circuit court.

R. PIAGGIO *vs.* N. O. INS. ASSOCIATION. } No. 6292.

The defendants beg leave to file their application for a new trial, suggesting:

1st. That the verdict of the jury is contrary to the law as charged by the court and to the facts.

2d. That the court charged the jury "that the only damages which the insured can claim for withholding payment of policy of insurance during judicial contestation to test their liability on the same are assessed by law as legal interest, and that profits in expectation are
50 too remote to be considered;" that the court, on defendants' objections, overruled proof of such damages on the trial, but the jury, nevertheless, allowed the plaintiff not only said legal interest, but the sum of five thousand dollars as damages, contrary to the law and the facts of the case.

3d. That the finding of the sum of seven thousand dollars on the hull of the Sicilia was in flagrant violation of the plaintiff's own pleadings, which averred that, between the 15th July and 15th October, the Sicilia was by special warranty not to use the port of Matanzas, and that she used the port of Matanzas during fifty days between said dates, when and where she became a total loss, as will more fully appear by reference to the petition and policy made part thereof.

Wherefore defendants pray that plaintiff show cause on Tuesday, the 30th day of May, 1871, why the verdict of the jury should not be set aside, and a new trial awarded in the course of law.

(Signed) E. BERMUDEZ,
(") A. VOORHIES,
Att'ys for Defendants.

Marshal's return.

Received May 26th, 1871, by the U. S. marshal, and on the same day, month, and year served a copy of the within rule & grounds
51 on Carleton Hunt personally in the United States court-room.
New Orleans, May 26th, 1871.

(Signed) S. W. REED,
D'y U. S. Marshal.

Answer to rule.—Filed June 7th, 1871.

United States circuit court.

R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

Now comes Rinaldo Piaggio, the plaintiff in this suit, and for cause why defendants' application to set aside the verdict of the jury heretofore rendered, and for a new trial, should be refused, respectfully shows:

That the said verdict is in conformity with the law as charged by the court and the facts of the case as proved to the jury.

That the damages herein found were not at all, as is erroneously represented by defendants, damages claimed by the insured for withholding payment on a policy of insurance during judicial contestation to test liability thereon, and no such damages are in this suit sought and claimed by plaintiff.

52 That plaintiff's original petition did separately allege and show that, after the total loss of the Sicilia from perils insured against, the defendants, The New Orleans Insurance Association, well knowing all the circumstances concerned, and before any judicial contestation, accepted the abandonment of the Sicilia by the assured, and promised to pay plaintiff five thousand seven hundred dollars in gold, the entire amount insured on the freight list of the Sicilia, and actually advised plaintiff they would telegraph their bankers in London to pay the same to his order, and induced him to draw the same; and that the said association did, notwithstanding, afterwards fail and refuse to keep their engagements, and so deceived plaintiff, and broke faith with him; and that plaintiff's draft was, in consequence of said false promise, deceit, and breach of faith, not accepted or paid, but was protested, and his credit abroad injured, and his mercantile business disturbed, impeded, and damaged to the extent of fifteen thousand dollars.

That plaintiff's right to recover damages for this injury caused him by & this deceit and violation on the part of the defendants of their express promise to accept and pay his draft was not specially de-

53 nied or *accepted* to; that evidence to prove such allegations and damages, went before the jury without objection or exception; and it is not competent for defendants, after having tried this point and taken their chance and been unsuccessful, to demand a new trial on that ground.

That the putting in of the Sicilia to Matanzas and her stay there as established in evidence, did not forfeit, as the defendants represent, the insurance on the hull of the said vessel—first, because such insurance was under a time and not a voyage policy; second, because even otherwise, by the written clause in said policy, a general privilege was allowed the Sicilia to resort to any port except beyond Cape Horn or the Cape of Good Hope; and third, because, according to law and the said policy, the Sicilia had a right to put in and stay as she did, at Matanzas for the security of the property concerned, and to preserves the lives of those on board—a great part of the crew being disabled by sickness.

And plaintiff represents that the verdict of the jury in his favor does justice between him and the defendants and ought not to be disturbed; that the evidence establishes gross wrong, injury, and damage

54 done him by the New Orleans Insurance Association; and that they aggravated the same by wantonly charging fraud herein, without color of right in law or fact.

Wherefore he prays that their said rule for a new trial be dismissed with costs, and for such further relief as equity & law and the case requires.

(Signed) CARLETON HUNT,
(") RANDELL HUNT,
For Plaintiff.

Submission of rule.—Extract from the minutes of June 7th, 1871.

United States circuit court.

R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

The rule for a new trial came up—A. Voorhies for plaintiffs in rule; R. & C. Hunt for defendant in rule—and after hearing argument and answer to rule the court took time to advise.

Order, new trial refused.—Extract from the minutes of June 19th, '71.

United States circuit court.

55 R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

For reasons orally assigned, it is ordered that a new trial be refused, with costs.

Judgment from judgment docket.

United States circuit court, fifth circuit & district of Louisiana, April term, 1871.

NEW ORLEANS, *Tuesday, May* 23, 1871.

Court met pursuant to adjournment.
Present, Hon. E. H. Durell, dist. judge.

R. PIAGGIO
vs.
N. ORLEANS INS. ASSOCIATION. } No. 6292.

By reason of the verdict and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiff, Rinaldo Piaggio, do have and recover from the defendant, the New Orleans Insurance Association, a corporation created under the laws of the State of Louisiana, the sum of seven thousand dollars under his policy of insurance, on the hull of the brig Sicilia, the sum of five thousand seven hundred dollars, gold coin, under his policy of insurance on the freight-list, together with
56 5 °|₀ interest on said two sums from the 29th September, 1870, till paid. And the further sum of five thousand dollars damages, with 5 °|₀ interest from 14th December, 1870, day of judicial demand, till paid, and costs of suit.

Judgment rendered May 23d, 1871.
Judgment signed June 20th, 1871.

(Signed) E. H. DURELL, *Judge.*

Petition for writ of error.—Filed June 20th, 1871.

United States circuit court.

R. PIAGGIO
vs.
N. O. INS. ASSOCIATION. } No. 6292.

To the hon. judges of the circuit court of the United States:

The petition of the New Orleans Ins. Association with respect represents that they consider themselves aggrieved by the judgment and verdict in the matter of R. Piaggio vs. said petitioners, No. 6292, of the docket of this court, that they consider said verdict and judgment as contrary to the law and evidence, and they wish to have the same reviewed in the Supreme Court of the United States.

57 Wherefore petitioners pray that they have a writ of error to the Supreme Court of the United States to operate as a supersedeas, returnable in due course of law, upon their furnishing bond and surety in such sum as your honors may fix and determine, pray for general relief; and as in duty bound, &c.

(Signed) A. VOORHIES, *Att'y.*

Order.

A writ of error, to operate as supersedeas, is allowed in this cause as prayed for, and, according to law, returnable to the Supreme Court of the United States, on the first Monday of December next, the petitioner giving bond in the sum of thirty thousand dollars with good and solvent security, conditioned as the law directs.

June 20th, 1871.

(Signed) E. H. DURELL, *Judge.*

Bond for writ of error.—Filed June 20th, 1871.

Know all men by these presents that we, Charles Cavaroc, president of the New Orleans Insurance Association, as principal, and W'm

58 Agar and F. E. Bernard, as sureties, are held and firmly bound unto Rinaldo Piaggio, in the full and just sum of thirty thousand dollars, to be paid to the said Rinaldo Piaggio, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 20th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein Rinaldo Piaggio is plaintiff, and The New Orleans Insurance Association is defendant, judgment was rendered against the said New Orleans Insurance Association, defendant; and the said New Orleans Insurance Association having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Rinaldo Piaggio, citing and ad-

59 monishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now the condition of the above obligation is such, that if the said

New Orleans Insurance Association shall prosecute its writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) C. CAVAROC. [L. S.]
(") WILLIAM AGAR. [L. S.]
(") F. E. BERNARD. [L. S.]

Sealed and delivered in presence of—
(Signed) A. VOORHIES.
(") G. LANAUX.

60 UNITED STATES OF AMERICA,
Circuit Court of the United States,
Fifth Circuit and District of Louisiana:

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States, for fifth circuit and district of Louisiana, do hereby certify that the foregoing 59 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of Rinaldo Piaggio vs. The New Orleans Insurance Association, No. 6292 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 24th day of August, A. D. 1871.

SEAL.] F. A. WOOLFLEY, *Clerk.*

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 24th day of August, A. D. 1871.

E. H. DURELL, *Judge.*

61 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or one of you, between Rinaldo Piaggio, plaintiff, and The New Orleans Insurance Association, defendant, No. 6292 of the docket of said circuit court, a manifest error hath happened, to the great damage of the said New Orleans Insurance Association, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause

further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 20th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.]

D. URBAN,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6292. The New Orleans Insurance Association, plaintiff in error, versus Rinaldo Piaggio, defendant in error. Writ of error. Filed June 20, 1871. F. B. Vinot, d'y cl'k.

62 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to Rinaldo Piaggio, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the first Monday of December next, pursuant to a petition & a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein The New Orleans Insurance Association is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said petition & writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 20th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

E. H. DURELL, *Judge.*

63 (Indorsed:) United States circuit court. No. 6292. The New Orleans Insurance Association, pl'ff in error, vs. Rinaldo Piaggio, defendant in error. Citation.

Marshal's return.

Received Jun' 20, 1871, by the U. S. marshal, and on the 21st of June, 1871, served a copy of this citation on Rinaldo Piaggio, defendant in error, by handing the same to him in person at the cor. of Canal & Tchoupitoulas streets, in this city.

S. W. REED,
D'y U. S. Marshal.

JUNE 21, 1871.

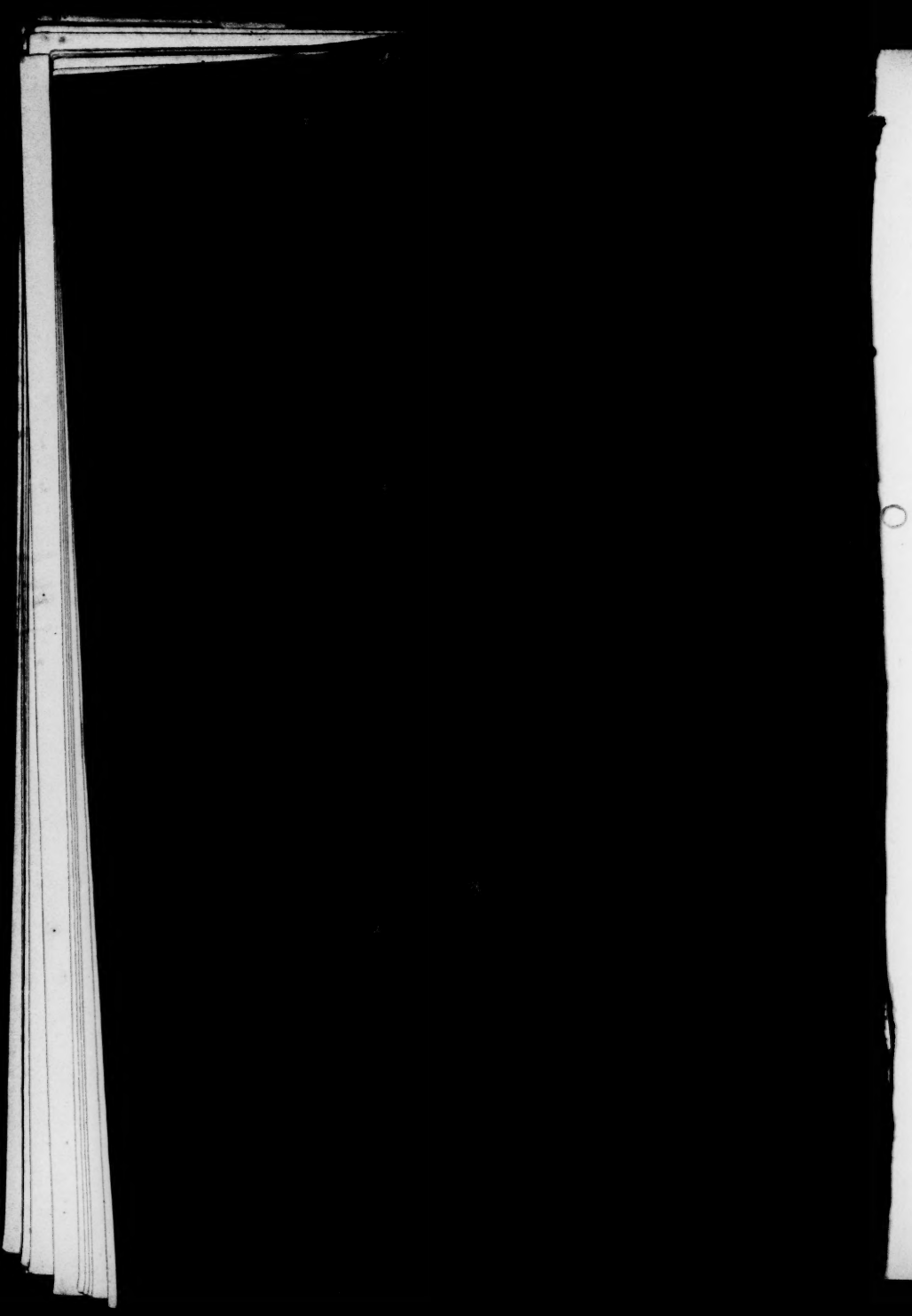
On this 8th day of July, 1871, personally appeared before me, the subscriber, S. W. Reed, and makes oath that he delivered a copy of the within citation as stated in his official return hereon.

S. W. REED.

Sworn & subscribed before me.

F. B. VINOT, *D'y Clk.*

(Indorsement on cover:) No. 376. The New Orleans Insurance Association, plaintiff in error, vs. Rinaldo Piaggio. Louisiana C. C. U. S. Filed 11th November, 1871.



IN THE HONORABLE THE

Supreme Court of the United States.

THE NEW ORLEANS INSURANCE ASSOCIATION, PLAINTIFF IN ERROR,
vs.
RINALDO PIAGGIO.

No. 145.

BRIEF OF COUNSEL OF DEFENDANT IN ERROR.

The plaintiff in the court below declared on a policy of insurance issued by the defendant's company, by which they undertook, under the usual forms, to insure the hull, cargo, and freight list of the Italian brig *Sicilia* on a voyage from New Orleans to Helsingfors, in the Gulf of Finland, with a cargo of cotton.

See Rec., p. 1.

By the terms of the policy, annexed to plaintiff's petition, the vessel was valued at $10,000, (see Rec., p. 3, near the middle,) but the risk taken was only $7,000.

See same page, top.

By a further agreement, the freight money to be earned on the voyage was insured at $5,700 in gold, as appears by the certificate on page 6 of the record, which was to be deemed the same as the policy, and entitled the holder to payment in case of loss in London.

The plaintiff below declared that the vessel by the perils of the sea was compelled to put into Matanzas, Cuba, in distress and disabled, a condition which was aggravated by the sickness of the crew.

That from Matanzas the master of the vessel communicated by telegram to plaintiff that extensive repairs were necessary to enable the vessel to continue her voyage, and inquired whether the vessel should be abandoned to the underwriters; that plaintiff showed the telegram to the president of defendant's company, who advised him to abandon, which he did, claiming total loss, and the defendant accepted the abandonment on 29th September, 1870.

See Petition, pp. 1 and 2.

That while the vessel was thus lying in the harbor at Matanzas, she was driven ashore by a hurricane, and, with her cargo, totally lost.

That the defendants having promised to pay plaintiff the loss on hull $7,000, and the loss on freight list $5,700, in gold in London, also promised to telegraph their banker in London to pay the sum to plaintiff's order, but several days after informed plaintiff they retracted, and had countermanded the order given to the London bankers; in the meantime plaintiff had forwarded the certificate (see copy Rec., p. 6) to Campanello, a merchant of Genoa, Italy, and drew a draft against the amount, which draft was protested, by reason of the defendants countermanding the order given to their banker in London to pay the face of the certificate, and by this plaintiff's credit in Genoa, with which place he had habitual dealings, was greatly injured, to his damage $15,000.

See Rec., p. 2.

Plaintiff below further declared that defendants had reinsured on this risk $10,000 with another company on the cargo of the vessel, and on the 14th of November defendants paid to said company the loss on said risk.

See Rec., pp. 7 and 8.

Plaintiff further declared that he tendered an abandonment of the freight list on the 4th October, 1870, (see Rec., p. 8,) and that the freight list was insured under an open policy, and he annexed a copy of the application and policy.

See Rec., pp. 8 to 12.

Plaintiff further declared that the defendant publicly advertised for sale the wreck of the *Sicilia* as she lay at Matanzas, and sent thither an agent to take possession of her after the abandonment, who sold her, and defendant received the proceeds, while her damaged cargo of cotton was brought to New Orleans and sold for the benefit of the defendants and other underwriters.

See Rec., pp. 13 and 14.

The defence admitted the execution of the policies, but set up various matters in avoidance: that the *Sicilia* was unseaworthy; was not properly officered, manned, and provisioned; that the cargo was not properly stored; that she was compelled to put into Matanzas by unseaworthiness, and not by perils of the sea; that the abandonment was accepted by defendants, relying on the good faith of plaintiff, and under mistake of facts brought about by fraudulent concealment of plaintiffs.

See answer, Rec., pp. 12 and 13.

That when this agent was sent to Havana no information had been received of the hurricane which took place while the vessel was in port; that he was sent for the benefit of whom it might concern, and with the participation of plaintiff; with further charges of fraud.

See Rec., p. 14.

The jury found for the plaintiff $7,000 on his policy on the hull; $5,700 gold on the freight list; interest on both

amounts as prayed for in petition, and $5,000 damages, with interest.

See Rec., p. 16.

There were five bills of exceptions taken by the defendants to the charges and refusals of their prayers for charges to the jury.

They will be considered in the order in which they occur on the record.

No. 1, (Rec. p. 16.)

The charge here asked for was properly refused. The assured had the right to abandon as for a constructive total loss so soon as it appeared either that there was no hope of making the repairs at all, or that the cost of the repairs would exceed 75 per cent. of the value.

See Arnold on Insurance, p. *1088.

In point of fact the assured did abandon, and that, too, under the advice of defendant, and there was no fraud.

Now, the vessel being thus a total loss, the right to abandon for freight list at once accrued.

See Arnold on Insurance, p. *1136.

So that the judge of the court below correctly refused to charge that the abandonment of the freight list in this case did not bind the underwriters.

No. 2, (Rec., p. 17.)

Here defendants asked for a charge on a question of law which was not applicable to the facts of the case, none having been proved to which the principle could be applied. Judges are not only not bound to give speculative and conjectural charges, but it is their duty to refrain from doing so.

See Hamilton *vs.* Russel, 1 Cranch, 310.

No. 3.

This was an attempt to obtain what had already been refused in No. 1. The plaintiff had abandoned and the abandonment had been accepted. This was conclusive on the underwriters unless they could show fraud. This they had had every opportunity of doing, but failed, and it appeared there was no fraud. Hence the question of the right of plaintiff to make an abandonment was concluded, and the court properly refused to leave the question to the jury.

The abandonment once accepted is irrevocable; the underwriters are bound by the acceptance, "and cannot be allowed to say that the loss is not total, after they have admitted that it was."

See Arnold on Ins., p. *1172.

The judge of the court below, then, properly refused the instruction for the reasons he assigned, that the abandonment had been accepted, and there was no proof of fraud.

No. 4.

The plaintiff had averred, as showing that defendant had acted on the question of the *Sicilia* as one of total loss, that he, the defendant, had himself insured the cargo in another company, and had settled as for a total loss. The evidence of this conduct was proper therefore to go to the jury, as displaying by the conduct of the defendant that he had accepted the abandonment, and that the facts justified it.

See Arnold on Insurance, page *1174.

The court, therefore, properly refused to charge the jury as required, after the evidence had gone in without objection.

No. 5.

The court charged the jury that if they believed the vessel was lost by storm and disaster at sea, that the plaintiff must recover, and the defendants excepted.

That such a charge was unobjectionable is too plain for discussion.

The judgment of the lower court should be affirmed.

Respectfully submitted.

THOMAS J. DURANT,
For Defendant in Error.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

The New Orleans Insurance Association, Plaintiffs in Error, *vs.* Rinaldo Piaggio, Defendant in Error,	No. 145.

Brief of Plaintiffs in Error.

STATEMENT.

The action was brought in December, 1870, by the plaintiff below, an alien, against The New Orleans Insurance Association, a Louisiana corporation, in the Circuit Court of the United States for the District of Louisiana, for a total loss under two policies of insurance—the one for $7,000 on the brig *Sicilia*, and the other for $5,000 on the freight of the brig.

The petition alleges that the brig, having sailed from

New Orleans for Helsingfors, in the Gulf of Finland, July 20th, 1870, was compelled "by the perils of the seas *and unavoidable accidents*," to put into Matanzas, Cuba That the plaintiff, upon news of the disaster, gave information to the insurers, and asked whether he should abandon the vessel, and was advised so to do. That thereupon he abandoned to the insurers, and claimed for a total loss, and the abandonment was accepted.

The petition further alleged that the brig, while in the port of Matanzas, was driven ashore by a hurricane, and, with her cargo, was wrecked and entirely lost.

The petition further alleged that the insurers promised to pay the insurance on freight, and informed the plaintiff that they would telegraph their bankers in London to pay the same to plaintiff's order, but that soon after they declined to pay or recognize the loss, and recalled their instructions for payment given to their bankers. That when plaintiff was informed the insurance on freight would be paid, he drew against the amount on his correspondent in Genoa, to whom he had transferred the certificate of insurance on freight; that his draft was protested, and thereby his credit was injured and his business damaged to the extent of $15,000.

The plaintiff claims to recover the sums insured, and the damage of $15,000 for their non-payment, with interest.

Rec., fol. 1–6.

The plaintiff filed a supplemental petition January 7th, and another supplemental petition January 12th, 1871. The policy on vessel is annexed to the original petition, and on freight to one of these supplemental petitions.

Rec., fols. 20–24.
Vessel policy, fols. 7–16.
Freight policy, fols. 17, 26–34.

The answer of the defendants puts in issue, by denial, all the allegations of the petition, alleges that the policies were void for non-payment of premiums, that the brig was unseaworthy, and in equipment, provisions and crew wholly unfit for the navigation of her voyage; that she put into Matanzas from unseaworthiness, and not from perils of the seas, and there the plaintiff's agents, finding it impossible to raise money by bottomry to make her seaworthy, telegraphed a false account of her disasters, and the defendants, trusting thereto, assented to abandonment, and, to accommodate the plaintiff, were willing to advance funds without waiting for the proofs and delays required by the policy; that, learning the truth as to the abandonment, they revoked their acceptance of it, and declined to make the accommodation advances.

The answer then alleges that the policies are vitiated by the brig's deviation in voluntarily putting into Matanzas.

Rec., fol. 34–36.

On the 27th January, 1871, the plaintiff filed a further supplemental petition, alleging acts of the defendants and their agents, in taking possession of the brig and selling her, taking the proceeds of her sale, and also in bringing her cargo to New Orleans.

Rec., fol. 37–38.

The defendant's answer, filed in answer to the supplemental petitions, alleged that all these steps of the defendants were taken for the benefit of whom it might concern, and with the participation of the plaintiff, *and with a distinct reservation of the matter of abandonment;* that these steps were all taken upon the false information respecting the disaster given by the plaintiff, and would not have been taken otherwise.

Rec. fol. 39.

The case was tried before a jury and they gave a verdict as follows:

"That the plaintiff shall recover from defendants the sum of seven thousand dollars, under his policy of insurance on the hull of the vessel; the sum of five thousand seven hundred dollars, gold coin, under his policy of insurance on the freight-list, together with interest on these two amounts, as prayed for in his petition, and the further sum of five thousand dollars damages, with interest at the rate of five per cent. from the date of judicial demand."

Rec., p. 16.

Upon this verdict judgment was given as follows:

"By reason of the verdict and in accordance therewith, it is ordered, adjudged and decreed that the plaintiff, Rinaldo Piaggio, do have and recover from the defendant, The New Orleans Insurance Association, a corporation created under the laws of the State of Louisana, the sum of seven thousand dollars under his policy of insurance on the hull of the brig *Sicilia*, the sum of five thousand seven hundred dollars, gold coin, under his policy of insurance on the freight-list, together with five per cent. interest on said two sums from the 29th September, 1870, till paid, and the further sum of five thousand dollars damages, with five per cent. interest from 14th December, 1870, day of judicial demand, till paid, and costs of suit."

Rec., p. 21.

A motion to set aside the verdict and for a new trial was made, raising, *upon the record itself*, two questions of law.

First.—The allowance and computation in the verdict of five thousand dollars and interest thereon—*as damages for non-payment of the insurance on freight*, ($5,700)—in addition to the full sum insured under both policies and interest thereon.

Second.—That the verdict for the insurance under the vessel policy was contrary to law, and to the policy as pleaded by the plaintiff, inasmuch as the brig was warranted not to use the ports of the West Indies between the 15th July and the 15th October, and that by and in her use of the port of Matanzas, in breach of that warranty, the loss occurred for which recovery was sought.

The motion was overruled and judgment signed thereafter.

Rec. fol. 49–55.

Besides these errors, apparent upon the judgment record itself, five bills of exception at the trial were duly presented and signed and appear in the record before this court.

These all relate to the charge of the Court, either in respect of instructions given or instructions refused, and are as follows:

I.—The defendants requested the judge to charge,

"That, if the jury find that the plaintiff abandoned the voyage when he had no right to make the abandonment of the *Sicilia*, by reason of repairs needed, falling short of the seventy-five per cent of valuation of said *Sicilia*, under the warrantee of the policy on the hull, then the plaintiff cannot recover on the policy for the freight, and his abandonment of the freight-list to the insurers did not bind the latter."

Rec., fol. 43–4.

To the refusal of the judge so to charge the exception was taken.

II.—The defendants requested the judge to charge,

"That an abandonment made by plaintiff through error, and accepted through error by the defendant, whether conditionally or unconditionally, is null and void, if not warranted at the time under the policy of insurance."

Rec., fol. 44.

To the refusal of the judge so to charge, the exception was taken.

III.—The defendants requested the Judge to charge,

"As the policy of insurance warrants that the insurers would be liable only for total loss, or constructive total loss, when the damage exceeded seventy-five per cent., if the jury find that the damage to the brig *Sicilia*, when in the port of Matanzas, did not exceed seventy-five per cent. of the value put on her in the policy after deductions stated in said policy, then the plaintiff had no right to make an abandonment."

Rec., fol. 45–6.

To the refusal of the judge so to charge, the defendants excepted.

IV.—The defendants requested the Judge to charge,

"That the reinsurance by defendants of the cargo of the *Sicilia* to the amount of $10,000, which had been insured by another company, not being made in favor of plaintiff, who was a total stranger to this transaction, has no connection with the issues raised as to the policy on the hull and freight of the *Sicilia*, and therefore can have no bearing on the decision of this jury; and that in the absence of proof as to the warranties in said insurance and reinsurance policies of $10,000 on the cargo, it is impossible to determine whether or not the payment and reimbursement of said $10,000 were properly and correctly made; and that, whether properly or improperly paid, that circumstance cannot militate for or against either of the plaintiff or defendants in the present controversy.

Rec., fol. 47.

To the refusal of the judge so to charge, the defendants excepted

V.—The judge, upon request of the plaintiff, charged the jury as follows:

"That, independent of the abandonment, if the jury believe there was an actual total loss by storm and disaster of the sea, the plaintiff has a right to recover."

Rec., fol. 48.

To this charge of the judge the defendants excepted.

The return to this court does not contain the evidence at the trial, which seems to have occupied several days, and a memorandum of the cause of the trial is given at

Rec., fols. 40–42.

The case comes here by Writ of Error.

Assignment of Errors.

First.—The allowance and computation in the judgment of damages, for non-payment of the freight insurance, to wit, five thousand dollars and interest thereon, over and above the full sums insured in both policies and interest thereon.

Second.—The allowance and computation in the judgment of the loss under the vessel policy, notwithstanding the breach of the warranty against the use of West India ports in that policy, and the loss of the vessel in such a port during such breach.

Third.—The errors in the refusals to charge, and in the charge, as specifically set forth in the five bills of exceptions and the foregoing statement.

POINTS.

First Point.—The judgment must be reversed, and the verdict set aside and a new trial ordered, for the manifest error whereby a recovery was had—over and above the sums of insurance in both the vessel and the freight policies, and interest thereon—for the sum of five thousand dollars and interest thereon, as damages to the plaintiff for non-payment of the loss under the freight policy, as the plaintiff desired, and, at one time, had reason to expect.

I. It is not necessary to argue, or adduce authorities for, the proposition that interest is the only damages for the simple non-payment of money according to duty, or to implied or express contract.

The allowance of damages for exchange and re-exchange against the drawer of a protested foreign bill of exchange, by the law-merchant or by express statute, proceeds upon the special element of that contract providing for payment at a particular and foreign place.

II. The gross absurdity of the plaintiff's claim of fifteen thousand dollars damages for disappointment in the early and voluntary payment of the sum of $5,700 before it was due, in fact or in date, is scarcely modified by the jury's allowance of the sum of *only* $5,000 on that account.

III. Upon what 'reasons, orally assigned," the learned Judge Durell refused to set aside this verdict as contrary to law, when he had himself charged the jury "that the only damages which the insured can claim for withholding payment of policy of insurance during judicial contestation to test their liability on the same, are assessed by law as legal interest, and that profits in expectation are too remote to be considered," we can only conjecture.

Manifestly, the verdict of the jury is flatly against this charge, and must have been wholly unsupported by any evidence, as the Court, on the defendant's objection, seems to have overruled proof of such damages at the trial.

Rec., fol. 50.

IV. That this is error, on the face of the record, and without any reference to any possible evidence or ruling at the trial, and that, for this error, the judgment below must be reversed, is indisputable.

Second Point.—As to the second ground for a new trial for error apparent upon the record, to wit: The breach of warranty, in the use of the West India port of Matanzas, and the wreck by a hurricane in that port, the only question seems to be as to the consequence of the absence from the record of any evidence bearing upon the point of this resort to the port of Matanzas being voluntary or under stress from perils insured against.

But, on the face of the contract, a breach of its warranty arises by the resort to this West India port, and the wreck from peril there supervening.

The affirmative proofs to defeat this consequence of this apparent breach of warranty is wholly wanting.

Presumptively, no such proof was offered at the trial. It is not allowable for the plaintiff in error to encumber the record by *all the evidence at the trial* upon the motive and to the end of showing that no such proof was given.

The defendant in error should have procured the presence of such evidence, if any was given at the trial, by the appropriate applications in the Court below or in this Court.

Upon this second ground, therefore, the judgment below should be reversed, and the verdict set aside and a new trial ordered.

Third Point.—As a reversal of the judgment below and a new trial must follow from the errors manifest on the face of the record, it seems unnecessary to insist, at much length, on the errors exhibited on the bills of exception. But, for these errors, the judgment must be reversed and a new trial ordered.

I. The instruction asked for and refused, and made the occasion of the *first* bill of exceptions, was proper to be given, and the refusal to give it was error.

Rec., fol. 43.

The Court put its refusal to give this instruction upon the single ground "that it was in proof that an abandonment had been made and accepted without fraud, and under and in accordance with the advice of the defendants."

But this was in issue on the pleadings and proofs, and was the very thing to be passed upon by the jury. The Court refused a proper instruction, on a question of law, by usurpation of the province of the jury, on a question of fact.

II. The same observations, in substance, apply to the *second* bill of exceptions.

A proper instruction, as matter of law, is re-

fused upon an assumption of a conclusion of fact, which belonged to the jury.

Rec., fols. 44–5.

III. The error under the *third* bill of exceptions is of the same character as that under the *first*; the observations made upon that are applicable to this.

Rec., fol. 46.

IV. The instruction asked for and refused was clearly proper, and the exception in the *fourth* bill of exceptions was well taken.

Rec., fol. 47.

The evidence had been taken upon this extraneous transaction, and for the purpose of affecting the verdict of the jury, which it was well calculated to do.

The Court was rightly called upon to exclude this consideration from affecting the mind of the jury, unless it was, in law, a proper subject for their consideration in this case.

It manifestly was not proper, as an element in the jury's conclusions in this case, and the refusal of the instruction was *error*.

V. The passage in the charge of the Judge made the subject of the *fifth* bill of exceptions, as an abstract and general proposition, may be unobjectionable.

But, indisputably, the only "actual total loss by storms and disaster of the sea," was by the hurricane in the port of Matanzas, and this naked charge, applied to this state of facts, was equivalent to a peremptory charge that, without regard to the antecedent history of the voyage, or to the warranties of the policies, the plaintiffs had a right to recover for a total loss under both policies.

But this depends upon the question whether the total wreck by the hurricane, in the port of Matanzas, was covered or not by the policies, as an original and independent cause of loss.

And this depended upon the previous history of the voyage, and could only be disposed of by the verdict of the jury, under proper instructions from the Court, covering these anterior considerations.

Last Point.—The questions of insurance law raised upon this record are neither difficult nor obscure, and the errors of the Court below are manifest.

The judgment should be reversed, and a *venire de novo* ordered.

WM. M. EVARTS,
Of Counsel for
Plffs. in Error.

Schultz v. Pac. R. R. 360.